Manilal & Sons (M) Sdn Bhd v Pentadbir Tanah Daerah, Kulim & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO K-01-133 OF 1995
SITI NORMA YAAKOB, ABDUL MALEK AHMAD JJCA AND MOHD NOOR AHMAD J
2 JULY 1997

Land Law *— Transfer — Validity of — Whether transfer of land valid despite presence of private caveat on titles — National Land Code 1965 s 322(2)(c)*

Land Law *— Transfer — Application to delete registration of transfer — Transfer of land registered despite presence of private caveat —Whether proper procedure had been followed to delete transfer of the lands — National Land Code 1965 ss 417(1) & 418(1)*

The appellant made two advances to one Mahalingam Ratnavale ('Ratnavale') to enable the latter to purchase certain lands ('the lands'). Ratnavale passed away without settling the balance of the advances. The lands were then registered in the names of the executors of Ratnavale's estate ('the executors'). The appellant had entered a private caveat against the land based on the ground that Ratnavale had, in his lifetime, agreed to charge the lands as security for the advances. Thereafter, the second respondent had also lodged a private caveat against the lands on the basis of an agreement with the executors to charge the lands as the security for a loan granted by her to the executors. Over the years, the appellant and the second respondent had lodged a series of caveats against the lands.

Meanwhile, the appellant instituted recovery proceedings against the executors. The judicial commissioner found in favour of the appellant and held that the executors repay the appellant the balance sum advanced by Ratnavale and that the executors be restrained from transferring, charging, or in any way dealing with, the lands. This was confirmed by the (then) Supreme Court.

On 14 April 1992, the Supreme Court ordered the first respondent to remove the second respondent's private caveat ('the Supreme Court order'). Before the appellant had served the Supreme Court order on the first respondent, the second respondent applied for the entry of a lien-holder's caveat under s 330 of the National Land Code 1965 ('the NLC'). Subsequent to the entry of the lien-holder's caveat, the first respondent transferred the lands into the second respondent's name.

The appellant filed proceedings for an order under s 417 of the NLC directing the first respondent to expunge or delete the registration of the transfer of the lands to the second respondent so as to give effect to the Supreme Court order. The High Court judge found that the appellant's motion amounted to asking the court to go behind the Supreme Court order as it sought to determine the interest and title of disputing parties to the lands by way of affidavits. The judge considered that he was not competent to do so and ruled that on the

facts of the case, the appellant should have availed themselves of the statutory remedy under s 418 of the NLC. The appellant appealed. A

The issue raised was on the question as to whether the proper procedure had been followed by the appellant when they filed these proceedings under s 417 of the NLC to challenge the first respondent's action in registering a transfer of the lands into the second respondent's name despite the presence of the appellant's private caveat. B

Held, allowing the appeal:

(1) (Per **Abdul Malek Ahmad JCA**) The effect of the Supreme Court order was that the second respondent had no caveatable interest over the lands as from that date. Therefore, if she had no caveatable interest, she could not enter a lien-holder's caveat and subsequently obtain a transfer of the lands into her name. With that order, the documents of title should only have the appellant's caveat and nothing else. This was because the second respondent had lost her caveatable interest. Any transfer would be contrary to the Supreme Court order as the basis for it had been removed. Any lien-holder's caveat would be against the NLC. C D

Further, the caveat by the appellant was still on the register. As such, the first respondent was prevented from entering the lien-holders's caveat and registering the transfer in view of sub-s (2) of s 322, in particular para (c), of the NLC, even without the Supreme Court order. In effect, the orders of the first respondent as regards the entry of the lien-holder's caveat and as regards the transfer of the lands could not be said to be valid. As such, an appeal under s 418 of the NLC was out of the question. E F

In the circumstances, the application had been correctly made under s 417 of the NLC. There was no necessity to resort to s 418 of the NLC as the transfer was a nullity (see pp 600E–G, 601G and 602G); *Eu Finance Bhd v Lim Yoke Foo* [1932] 2 MLJ 37 followed.

(2) (Per **Abdul Malek Ahmad JCA**) The second respondent could not acquire any proprietary rights over the lands until she had obtained a judgment for the debt due to her from the executors. And, to execute that judgment, she would have to get an order for sale of the lands pursuant to sub-ss (2) and (3) of s 281 of the NLC (see p 599H–I). G H

(3) (Per **Mohd Noor Ahmad J**) The extent of the operation of s 417 is of limited application only. It does not empower the court to allow a defective or void private caveat to be amended by the caveator and it does not authorize the court to direct the registrar to make an entry inconsistent with the scheme of the NLC. However, the expression 'any judgment or order given or made in any proceedings' appearing in s 417(1) is not confined only to a judgment or order given or made in the impugned proceeding but also includes any existing valid order of the court I

made in previous proceedings relating to the same lands. The subsection should be given a liberal interpretation so that the exercise of the inherent or general powers of the court over the registrar would be more meaningful in order to ensure that the registrar really complies with the provisions of the NLC. That being the case, 'any order' referred to in the subsection should not be confined only to the Supreme Court order but should also include the injunction order made by the judicial commissioner in the previous proceeding which was valid and still existing. And the only way to give effect to the latter order was for the court, under the subsection, to direct the registrar to cancel the entry of the lien-holder's caveat and the registration of the transfer.

In this case, although the appellant's motion only related to the Supreme Court order, the direction could be given by virtue of the inherent powers of the court under O 32 r 4 of the Rules of the High Court 1980 which is preserved by O 4 of the Rules of the Court of Appeal 1994 (see pp 603F–I and 604A–C).

(4) (Per **Mohd Noor Ahmad J**) The Registrar was wrong in registering the injunction as a prohibitory order because the injunction was not such an order as envisaged by s 334 of the NLC. Furthermore, such endorsement was wrongly made because there is no provision in the NLC for an injunction order to be registered on the titles (see p 604C–E).

(5) (Per **Siti Norma Yaakob JCA**, dissenting) The extent of the application of s 417(1) is limited to require the first respondent to take appropriate steps to comply with the Supreme Court order. That order in no uncertain terms directed the first respondent to remove the private caveat lodged by the second respondent. The first respondent had since removed the second respondent's private caveat when a copy of the Supreme Court order was served on him. As the order contained no other directive, the first respondent had done all that he had been ordered to do by the Supreme Court. To expect him to delete the transfer as well would be reading into the Supreme Court order a directive that was not there (see p 588B–D).

(6) (Per **Siti Norma Yaakob JCA**) On the facts of this case, the only way the transfer could be cancelled was for the appellant to proceed under s 418 of the NLC. Section 418(1) allows the appellant to appeal to the High Court against such an action but their right to do so is limited to the three-month period of the transfer being communicated to them. Since no appeal had been filed by the appellant within that period, the matter had become statute-barred.

In any event, it was highly improper to question the second respondent's proprietary rights in proceedings under s 417(1) based on affidavit evidence alone. Thus, on the facts of this case, s 417(1) of the NLC had not been correctly applied for by the appellant (see pp 588F–I and 589C–E).

[Bahasa Malaysia summary

Perayu telah membuat dua bayaran pendahuluan kepada seorang bernama Mahalingam Ratnavale ('Ratnavale') bagi membolehkan Ratnavale membeli tanah-tanah tertentu ('tanah tersebut'). Ratnavale telah meninggal dunia tanpa menjelaskan baki bayaran pendahuluan. Tanah tersebut kemudiannya didaftarkan dalam nama wasi harta pusaka Ratnavale ('wasi-wasi'). Perayu telah memasukkan suatu kaveat persendirian terhadap tanah tersebut berdasarkan alasan bahawa Ratnavale, semasa hidupnya, telah bersetuju menggadaikan tanah tersebut sebagai cagaran untuk bayaran pendahuluan. Selepas itu, penentang kedua juga telah memasukkan kaveat persendirian terhadap tanah tersebut berdasarkan suatu perjanjian dengan wasi-wasi untuk menggadaikan tanah tersebut sebagai cagaran untuk pinjaman yang diberikannya kepada wasi-wasi. Tahun demi tahun, perayu dan penentang kedua telah memasukkan suatu siri kaveat terhadap tanah tersebut.

Sementara itu, perayu telah memulakan prosiding bagi mendapat balik wang terhadap wasi-wasi. Pesuruhjaya kehakiman mendapati memihak kepada perayu dan memutuskan bahawa wasi-wasi harus membayar baki jumlah yang dibayar oleh Ratnavale kepada perayu dan bahawa wasi-wasi ditahan daripada memindahmilik, menggadai atau mengurus tanah tersebut dalam apa-apa cara pun. Ini telah disahkan oleh Mahkamah Agung.

Pada 14 April 1992, Mahkamah Agung memerintahkan penentang pertama supaya membatalkan kaveat persendirian penentang kedua ('perintah Mahkamah Agung'). Sebelum perayu menyampaikan perintah Mahkamah Agung kepada penentang pertama, penentang kedua telah memohon agar kaveat pemegang lien dimasukkan di bawah s 330 Kanun Tanah Negara 1965 ('KTN'). Susulan daripada kemasukan kaveat pemegang lien, penentang pertama memindahmilik tanah tersebut kepada nama penentang kedua.

Perayu memfailkan prosiding untuk satu perintah di bawah s 417 KTN yang mengarah penentang pertama untuk memadamkan atau membatalkan pendaftaran pindahmilik tanah tersebut kepada penentang kedua supaya memberi kesan kepada perintah Mahkamah Agung. Hakim Mahkamah Tinggi mendapati bahawa usul perayu sama seperti meminta mahkamah mengabaikan perintah Mahkamah Agung kerana ia cuba memutuskan kepentingan dan hakmilik pihak-pihak yang mempertikaikan tanah tersebut menerusi afidavit. Hakim menganggap beliau tidak kompeten untuk berbuat demikian dan memutuskan atas fakta kes, perayu sepatutnya menggunakan remedi statutori di bawah s 418 KTN. Perayu membuat rayuan.

Isu yang dibangkitkan adalah atas persoalan tentang sama ada prosedur yang wajar telah diikut oleh perayu apabila mereka memfailkan prosiding ini di bawah s 417 KTN bagi mencabar tindakan penentang pertama dalam mendaftarkan pindahmilik tanah tersebut kepada nama penentang kedua meskipun terdapat kaveat persendirian perayu.

Diputuskan, membenarkan rayuan:

(1) (Oleh **Abdul Malek Ahmad HMR**) Kesan perintah Mahkamah Agung adalah bahawa penentang kedua tidak mempunyai kepentingan boleh kaveat atas tanah tersebut dari tarikh itu. Maka, jika dia tidak mempunyai sebarang kepentingan boleh kaveat, dia tidak boleh memasukkan suatu kaveat dan kemudiannya memperolehi pindahmilik tanah tersebut dalam namanya. Dengan perintah itu, dokumen hakmilik seharusnya mempunyai kaveat perayu dan tidak lain daripada itu. Ini adalah kerana penentang kedua telah kehilangan kepentingan boleh kaveat. Sebarang pindahmilik akan bercanggahan dengan perintah Mahkamah Agung kerana dasar untuknya telah dibatalkan. Sebarang kaveat pemegang lien akan melanggar KTN.

Selanjutnya, kaveat oleh perayu masih kekal atas daftar. Oleh itu, penentang pertama dihalang daripada memasukkan kaveat amanah dan mendaftarkan pindahmilik memandangkan s 322(2), khasnya perenggan (c) KTN walaupun tanpa perintah Mahkamah Agung. Pada hakikatnya, perintah penentang pertama berhubung dengan kemasukan kaveat pemegang lien dan berhubung dengan pindahmilik tanah tersebut tidak boleh dikatakan sah. Oleh itu, suatu rayuan di bawah s 418 KTN adalah tidak mungkin. Dalam keadaan demikian, permohonan telah dibuat dengan betulnya di bawah s 417 KTN. Tiada keperluan untuk menggunakan s 418 KTN kerana pindahmilik itu merupakan satu pembatalan (lihat ms 600E–G, 601G dan 602G); *Eu Finance Bhd v Lim Yoke Foo* [1932] 2 MLJ 37 diikut.

(2) (Oleh **Abdul Malek Ahmad HMR**) Penentang tidak boleh memperolehi sebarang hak ketuanpunyaan ke atas tanah sehingga dia telah memperolehi penghakiman untuk hutang yang harus dibayar kepadanya daripada wasi-wasi. Dan, untuk melaksanakan penghakiman itu, dia haruslah mendapatkan satu perintah jualan untuk tanah tersebut menurut s 281(2) dan (3) KTN (lihat ms 599H–I).

(3) (Oleh **Mohd Noor Ahmad H**) Takat operasi s 417 adalah agak terhad. Ia tidak memberi kuasa kepada mahkamah untuk membenarkan suatu kaveat persendirian yang cacat atau terbatal dipinda oleh pengkaveat dan ia tidak memberi kuasa kepada mahkamah untuk mengarahkan pendaftar supaya membuat catatan yang tak konsisten dengan skim KTN. Namun demikian, ungkapan 'apa-apa hukuman atau perintah yang diberi atau dibuat dalam mana-mana pembicaraan' yang menonjol dalam s 417(1) tidak terhad hanya kepada penghakiman atau perintah yang diberikan atau dibuat dalam prosiding yang disoalkan tetapi juga termasuk sebarang perintah sah mahkamah yang wujud yang dibuat dalam prosiding yang lebih awal berkenaan dengan tanah yang sama. Subseksyen ini patut diberikan tafsiran yang liberal supaya pelaksanaan kuasa sedia ada atau kuasa am mahkamah ke atas pendaftar akan lebih bermakna bagi memastikan pendaftar benar-benar mematuhi peruntukan KTN. Oleh yang demikian,

'apa-apa perintah' yang dirujuk dalam subseksyen tidak patut dihadkan kepada perintah Mahkamah Agung tetapi juga harus termasuk perintah injunksi yang dibuat oleh pesuruhjaya kehakiman dalam prosiding yang lebih awal yang masih sah dan wujud. Dan satu-satunya cara untuk memberi kesan kepada perintah kedua adalah jika mahkamah mengarahkan pendaftar membatalkan kemasukan kaveat pemegang lien dan pendaftaran pindahmilik di bawah subseksyen ini.

Dalam kes ini, sungguhpun usul perayu hanya berkaitan dengan perintah Mahkamah Agung, arahan boleh diberikan disebabkan kuasa sedia ada mahkamah di bawah A 32 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 yang dikawal oleh A 4 Kaedah-Kaedah Mahkamah Rayuan 1994 (lihat ms 603F–I dan 604A–C).

(4) (Oleh **Mohd Noor Ahmad H**) Pendaftar adalah salah dalam mendaftarkan injunksi sebagai perintah larangan kerana injunksi itu bukanlah satu perintah yang dibayangkan oleh s 334 KTN. Tambahan pula, pengendorsan telah dibuat dengan salahnya kerana tiada peruntukan dalam KTN bagi perintah injunksi didaftarkan atas hakmilik (lihat ms 604C–E).

(5) (Oleh **Siti Norma Yaakob HMR**, menentang) Takat pemakaian s 417(1) adalah terhad supaya penentang pertama mengambil langkah yang wajar bagi mematuhi perintah Mahkamah Agung. Perintah itu tanpa ragu-ragu mengarahkan penentang pertama supaya membatalkan kaveat persendirian yang dimasukkan oleh penentang kedua. Penentang pertama sejak itu telah membatalkan kaveat persendirian penentang kedua apabila sesalinan perintah Mahkamah Agung disampaikan kepadanya. Oleh kerana perintah itu tidak mengandungi arahan lain, penentang pertama telah melakukan segala yang diarahkan oleh Mahkamah Agung. Untuk menjangka beliau juga akan membatalkan pindahmilik sama seperti melaksanakan arahan yang tidak dinyatakan di dalam perintah Mahkamah Agung (lihat ms 588B–D).

(6) (Oleh **Siti Norma Yaakob HMR**) Atas fakta-fakta kes ini, cara tunggal pindahmilik boleh dibatalkan adalah sekiranya perayu meneruskan tindakan di bawah s 418 KTN. Seksyen 418(1) membenarkan perayu membuat rayuan kepada Mahkamah Tinggi terhadap tindakan sedemikian tetapi hak mereka untuk berbuat demikian adalah terbatas kepada tempoh tiga bulan selepas pindahmilik dimaklumkan kepada mereka. Oleh kerana tiada rayuan telah difailkan oleh perayu dalam tempoh itu, perkara itu telah dihalang oleh statut.

Walau bagaimanapun, adalah tidak wajar untuk mempersoalkan hak ketuanpunyaan penentang kedua dalam prosiding di bawah s 417(1) berdasarkan keterangan afidavit sahaja. Justeru itu, atas fakta-fakta kes ini, s 417(1) KTN tidak dipohon dengan betul oleh perayu (lihat ms 588F–I dan 589C–E).]

Notes

For cases on transfer, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2893–2955.

Cases referred to

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)
Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37 (folld)
Heng Bak Teong & Anor v Ng Ah Seng [1988] 1 MLJ 406 (refd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)
Mahadevan & Anor v Patel [1975] 2 MLJ 207 (refd)
Manilal & Sons (M) Sdn Bhd v Mahadevan & Anor [1986] 1 MLJ 357 (refd)
Manilal & Sons (M) Sdn Bhd v M Majumder [1988] 2 MLJ 305 (refd)
Manilal & Sons (M) Sdn Bhd v M Majumder [1991] 3 CLJ 2172 (refd)
Mosbert Bhd (In liquidation) v Stella D'Cruz [1985] 2 MLJ 446 (refd)
Woon Kim Poh v Sa'amah bte Hj Kasim [1987] 1 MLJ 400 (refd)

Legislation referred to

National Land Code 1965 ss 281(2), (3), 301(c), 330, 322(2), (5), (6), 328, 334, 340(2), 417(1), 418
Rules of the Court of Appeal 1994 O 4
Rules of the High Court 1980 O 32 r 4
Specific Relief Act 1950 s 54(d)

Appeal from: Originating Motion No 25–26–1993 (High Court, Alor Setar)

Gan Teik Chee (*Gan Teik Chee & Ho*) for the appellant.
Mohd Zaki bin Mohd Yassin (Senior Federal Counsel) for the first respondent.
Manian Raju (*Gunaretnam & Co*) for the second respondent.

Cur Adv Vult

Siti Norma Yaakob JCA: The dispute between the appellant and the second respondent in this appeal concerns the right to the registrable interest of two pieces of land, Lots 290 and 461, held under SPK 1171 and SP 715 respectively, Mukim of Kulim, Kedah ('the lands') which have had a long history of being the subject matter of a number of litigation. It is from the reported judgments of these litigation that I am able to piece the background and trace the events leading to the present proceedings before us.

On 20 December 1966, the appellant's Managing Director, one JN Patel made the first of two advances to one Mahalingam Ratnavale ('Ratnavale'). This first advance amounted to RM29,500, followed on 21 March 1967 by the second advance of RM250,000. The total advance

of RM279,500 was to enable Ratnavale to purchase six pieces of land which included the two subject lands and formed part of an estate formerly called the 'Meera Estate'. The purchase was a joint investment of the appellant and Ratnavale with the first advance representing the 10% deposit towards the purchase price. There were some arrangements between the parties that the second advance was to be secured by a charge created by Ratnavale over the lands in favour of the appellant. It would appear that after the lands were purchased, they were registered in Ratnavale's name and true to his promise, Ratnavale created an equitable charge on the lands in favour of the appellant on 21 March 1967.

On 20 June 1968, Ratnavale made a repayment of RM50,000 to the appellant, thereby leaving a balance of RM229,500 outstanding. To repay this balance, Ratnavale promised to transfer the lands to the appellant and it was on the basis of this promise that JN Patel entered a private caveat bearing Presentation No 130/72, Folio 1/21, on the lands on 6 November 1972 on the appellant's behalf and on his own behalf. This was the first of many more caveats to be lodged by the appellant and the second respondent as with the expiry of each caveat, both parties entered new ones to protect their interests over the lands and these caveats became the centre of the dispute between them.

On 9 April 1973, Ratnavale passed away without settling the balance of the two advances and on 30 July 1974, JN Patel instituted recovery proceedings against the executors and trustees of Ratnavale's estate ('the executors') in Ipoh High Court Civil Suit No 235 of 1974. Pleadings were later amended to substitute the appellant in place of JN Patel. On 15 September 1974, the lands were registered in the names of the executors as the legal representatives of Ratnavale's estate.

At the same time, the executors filed Originating Motion No 18 of 1974 at the Alor Setar High Court against the appellant and JN Patel to remove their private caveat, bearing Presentation No 130/72, Folio 1/21, registered on 6 November 1972 but this application was dismissed on 7 December 1974. The executors appealed to the Federal Court in Civil Appeal No 6 of 1975 and it was pending the hearing of the appeal that the second respondent came into the picture when she lodged a private caveat against the lands on 30 May 1975 on the basis of an agreement with the executors to charge the lands as the security for a loan of RM100,000 granted by her to the executors.

Federal Court Civil Appeal No 6 of 1975 was dismissed on 6 June 1975 on the grounds that both the appellant and JN Patel had a caveatable interest over the lands and the judgment of the Federal Court appears as *Mahadevan & Anor v Patel* [1975] 2 MLJ 207.

On 28 May 1981, the second respondent entered her second private caveat over the lands on the basis of a purported debt of RM17,179.92 incurred by Ratnavale during his lifetime and allegedly due to her from the executors.

Ipoh High Court Civil Suit No 235 of 1974 was heard by the learned judicial commissioner, EE Sim JC, who proceeded on the basis as to

whether the cause of action against the executors has been barred by limitation. On 22 March 1983, the learned judicial commissioner held that the action was not barred by limitation, and found in favour of the appellant. Consequent thereto, the following orders were made:

(1) That the executors repay the appellant the balance sum of RM229,500 advanced by the appellant to Ratnavale on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah.

(2) The executors be restrained from transferring, charging, or in any way dealing with, the lands.

The executors appealed to the Federal Court in Civil Appeal No 119 of 1983 and on 20 January 1984, the Federal Court in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, allowed the appeal in part and held that the claim for the larger sum of RM250,000, being a personal loan to Ratnavale, was statute-barred. It however confirmed the finding of the judicial commissioner as regards the smaller sum of RM29,500 being part of a subscription for the purchase of Meera Estate. The appellant appealed to the Privy Council and, pending the outcome of this appeal, the appellant lodged another private caveat bearing Presentation No 471/84 on 18 October 1984 on the ground that Ratnavale had, in his lifetime, agreed to charge the lands as security for the advance of RM250,000.

By an order dated 10 February 1986, the Privy Council in Appeal No 10 of 1985 allowed the appellant's appeal, restored the decision of the judicial commissioner but deleted, inter alia, the words 'on a security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah' appearing in the order of the judicial commissioner. See *Manilal & Sons (M) Sdn Bhd v Mahadeven & Anor* [1986] 1 MLJ 357.

Following the decision of the Privy Council, the second respondent on 22 November 1986 filed Ipoh High Court Originating Summons No 31–1840–86, ex parte, praying for an order to remove the appellant's private caveat No 471/84. On 24 November 1986, Peh Swee Chin J (as he then was) granted her application and upon being made aware of this ex parte order, the appellant sought to have the order vacated and set aside. On 26 January 1987, the learned judge dismissed the appellant's application, confirmed the ex parte order and deleted that part of the Privy Council's order restoring the judicial commissioner's order imposing an injunction to restrain all dealings on the lands. The appellant appealed and in Civil Appeal No 52 of 1987, the Supreme Court on 25 April 1988 allowed the appeal, restored the appellant's private caveat No 471/84 and the injunction, set aside the High Court order dated 24 November 1986 on the ground that the learned judge had no jurisdiction to alter the decision of the Privy Council. See *Manilal & Sons (M) Sdn Bhd v M Majumder* [1988] 2 MLJ 305.

Whilst Supreme Court Civil Appeal No 52 of 1987 was pending, the second respondent lodged her third private caveat bearing Presentation No 258/87, Jilid 8, Folio 72 on 13 September 1987 against the lands on the strength of a promise contained in a letter dated 27 February 1973

written by Ratnavale's attorney to transfer the lands to her. I need to mention here that during his lifetime, Ratnavale granted two powers of attorney, the first dated 22 March 1971 to M Mahadevan and M Sandrasegara (who later became the executors and trustees of his estate) and the second dated 25 April 1972 to Annalakshmi Ratnavale nee Vettivellu Annalakshmi, to manage his affairs. A B

In 1990, proceedings were commenced by the second respondent against the donee of the second power of attorney in Ipoh High Court Originating Summons No 24–292–90 for declarations that the power of attorney dated 25 April 1972 granted by Ratnavale to Annalakshmi Ratnavale nee Vettivellu Annalakshmi, is void ab initio and that all dealings entered into by the donee, her servants, agents and nominees are of no effect in law or otherwise. On 9 March 1990, Peh Swee Chin J (as he then was) granted the declarations and the effect of this will be discussed presently. C

In an attempt to remove the second respondent's private caveat No 258/87, the appellant filed Alor Setar High Court Originating Motion No 25–29–89 and pending the hearing of this motion, the appellant lodged another private caveat bearing Presentation No 499/90, Jilid 14, Folio 86, in respect of the lands. D

Originating Motion No 25–29–89 was dismissed on 11 June 1991 by KC Vohrah J. See *Manilal & Sons (M) Sdn Bhd v M Majumder* [1991] 3 CLJ 2172. Dissatisfied, the appellant appealed and the Supreme Court in Civil Appeal No 02–254–91, allowed the appeal on 14 April 1992 ('the Supreme Court order') and ordered the first respondent to remove the second respondent's private caveat bearing Presentation No 258/87, Jilid 8, Folio 72, forthwith. E

It was after the Supreme Court order was obtained that the first respondent transferred the lands into the second respondent's name on 13 May 1992 at the request of the second respondent. Upon being made aware of this fact, the appellant's solicitors wrote to the first respondent for an explanation as to why the transfer was made despite the presence of the appellant's private caveat bearing Presentation No 499/90, Jilid 14, Folio 86, endorsed on the titles. When no answer was forthcoming, the appellant filed proceedings leading to this appeal in Alor Setar High Court Originating Motion No 25–26–93 on 24 August 1993 for an order under s 417 of the National Land Code 1965 ('the NLC') directing the first respondent to expunge or delete the registration of the transfer of the lands to the second respondent so as to give effect to the Supreme Court order. F G H

Mohd Ariff Othman J found that the appellant's motion amounted to asking the court to go behind the Supreme Court order as it seeks to determine the interest and title of disputing parties to the lands by way of affidavits. The learned judge considered that he was not competent to do so and ruled that on the facts of the case, the appellant should have availed themselves of the statutory remedy under s 418 of the NLC. On that finding, the learned judge dismissed the appellant's motion with costs. We are now asked to consider whether such a finding has been correctly made. I

A The only issue raised was on the question as to whether the proper procedure had been followed by the appellant when they filed these proceedings under s 417 of the NLC to challenge the first respondent's action in registering a transfer of the lands into the second respondent's name despite the presence of the appellant's private caveat bearing Presentation No 499/90, Jilid 14, Folio 86, on the titles. The fact that there is a restraining order barring any form of dealings over the lands endorsed in the titles, does not bind the first respondent as it interferes with his duties as a public officer. See s 54(d) of the Specific Act 1950.

For this appeal, only s 417(1) of the NLC is relevant and it contains the following provisions:

> 417 (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith.

The Supreme Court order is the order that the appellant seek to enforce and for ease of reference the relevant portion of the order is reproduced:

> Dan adalah diperintahkan bahawa Pentadbir Tanah Daerah dengan segera membatalkan Kaveat Sendirian Siri No 258/87 Jilid No 8, Folio No 72 yang dimasuki oleh M Majumder dengan mengikat tanah Lot No 290 di bawah Surat Putus Kechil 1171 and Tanah Lot 461 di bawah Surat Putus 715 Mukim Kulim, Kedah.

The effect of the Supreme Court order is that with the removal of the second respondent's private caveat, she no longer had any caveatable interest over the lands. Aware of her vulnerable position and even before the appellant had served the Supreme Court order on the first respondent, the second respondent had on 3 May 1992, filed a Form 19D application with the first respondent for the entry of a lien-holder's caveat under s 330 of the NLC. This application was however rejected by the first respondent. On 10 May 1992, she filed her second Form 19D application with the first respondent and it was subsequent to the entry of her lien-holder's caveat that the first respondent effected the transfer that is now being challenged.

The extent of the operation of s 417(1) was considered in *Mosbert Bhd (In liquidation) v Stella D'Cruz* [1985] 2 MLJ 446, where the Supreme Court held that (at p 448):

> ... The section is of limited application only and is intended to authorize the High Court to direct the Land Registrar to do all such things as may be necessary to give effect to any judgment or order made by the court affecting the land. It does not, in our judgment, give power to the court to allow a defective or void private caveat to be amended by the caveator.

That same sentiment was reaffirmed by the Supreme Court in the case of *Woon Kim Poh v Sa'amah bte Hj Kasim* [1987] 1 MLJ 400, with the added caution that 's 417(1) of the NLC does not authorize the making of an order or direction contrary to the NLC itself. It does not authorize the

court to direct the Registrar to make an entry inconsistent with the scheme of the NLC'. A

When dealing with the same subject matter, Judith Sihombing, in the second edition of her book, *National Land Code — A Commentary* has summarized it as follows:

> Thus, s 417 is resorted to to require the registrar or land administrator to take appropriate steps to comply with an order of that court. B
>
> The section does not set out the terms on which a court action can be taken but deals with the power of the court over the registrar; thus, it is not a section which deals with the circumstances in which action can be taken, but instead it confirms the inherent or general jurisdiction of the court over the registrar and land administrator. C
>
> Under this section, the order directing the registrar to act will usually be the result of an action where a party disputes the registration of another, or where a claimant has succeeded in proving to the court his right to be registered. For example, where a party has been successful in a priority claim before the court and is thereby entitled to become registered so as to displace an earlier registered party, the registrar, not being a party to the action, might refuse to register the appropriate memorial simply on the application of the successful party. In such a case, an order under this section will be necessary to require the registrar to carry out his duties in accordance with the terms of the NLC and the judgment of the court. D

E

With those principles of law in mind, I now consider the circumstances surrounding the transfer of the lands that is being questioned.

From the first respondent's affidavit in reply affirmed on 30 October 1993, he had stated that he had on 10 May 1992 (after the Supreme Court order was made but not served on him) received a Form 19D application form the second respondent, this being the second application (the first having been rejected) to enter a lien-holder's caveat on the lands to protect her interests following the deposit of the titles with her as security for the RM100,000 loan made by her to the executors. Together with the Form 19D, was also attached the second respondent's statutory declaration affirmed on 9 May 1992 and the High Court order dated 9 March 1990 ('the High Court order') granted by Peh Swee Chin J that I had referred to earlier and the relevant portions of that order insofar as they are relevant are reproduced for ease of reference: F G

> It is declared that the power of attorney dated 25 April 1972 by Mahalingam Ratnavale in favour of Annalakshmi Ratnavale nee Vettivellu Annalakshmi is void ab initio and of no effect at law or otherwise. H
>
> And it is also declared that all dealings entered into by the said Annalakshmi Ratnavale nee Vettivellu Annalaskshmi, her servants, agents nominees or otherwise under the said power of attorney dated 25 April 1972 are void ab initio and of no effect at law or otherwise.

I

Relying on the above documents, the first respondent had, on 10 May 1992, endorsed the register documents of title by:

(1) entering the High Court order; and

(2) entering the second respondent's lien-holder's caveat bearing Presentation No 180/92, Jilid 10, Folio 88.

Three days later, on 13 May 1992, the first respondent registered a transfer of the lands bearing Transfer No PTD 816/92, Jilid 208, Folio 30, into the name of the second respondent. There is no evidence when the second respondent lodged her Form 14A application for the transfer of the lands but considering the speed at which the transfer was effected, I can safely say that it was lodged together with her second Form 19D application on 10 may 1992 or very soon after that date. Faced with all the documents (except the Supreme Court order), tendered by the second respondent, the first respondent assumed that since the High Court order declared the power of attorney dated 25 April 1972 and all dealings made through it, void ab initio, the order also had the effect of rendering ineffective all the private caveats entered by the appellant since 1972 including the current one entered on 16 October 1990 bearing Presentation No 499/90, Jilid 14, Folio 86. Since there was no other impediment on the titles, the first respondent happily registered the transfer.

I consider that the assumption entertained by the first respondent as to the extent of the specific dealings affected by the High Court order cannot be right. The order declared only dealings done by the donee, Annalakshmi Ratnavale, her servants, agents or nominees, void following the main order that the power of attorney granted to her was declared void ab initio. Insofar as the appellant's private caveat lodged on 16 October 1990 is concerned, it has not been made ineffective by the High Court order as such a caveat was lodged at the instance of the appellant and had nothing to do with the donee at all. If at all the first respondent had considered the appellant's private caveat to be void on 10 May 1992, he did nothing to have it cancelled as the private caveat is still on the register to this very day. The presence of this private caveat has the effect of preventing the first respondent from making any disposition of the lands under s 322 of the NLC and the law on this is well settled. *Woon Kim Poh v Sa'amah bte Hj Kasim* [1987] 1 MLJ 400 at p 402 expresses it as follows:

> ... under s 322 of the NLC, so long as a caveat is in force, registration, endorsement or entry on the register document of title of any instrument of dealing shall be prohibited. The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. See also *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212. A caveat freezes the register at least until the caveator has taken court action to determine his claim — Judith Sihombing, at p 588. In the Torrens system where registration is the very basis of the system, the prohibition in s 322(2) must be strictly complied with. In other words, the registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provisions of the NLC.

I have already shown that over the years both the appellant and the second respondent have claimed interests over the lands by their conduct in lodging private caveats, with one part claiming to have a superior interest over the other. That claim would have been put to rest by the Supreme

Court order as it had the effect of divesting the second respondent of any caveatable interest over the lands. However, the second respondent took the precaution of regularizing her position by the lodgment and registration of her lien-holder's caveat under s 330 of the NLC which forms part of Cap 1 of Pt 19 of the NLC and which in part reads as follows:

> 330 (1) Any person or body with whom the issue document of title to any land, ... has been deposited as security for a loan may, as provided in section 281, apply to the Registrar under this section for the entry of a lien-holder's caveat in respect of the land ... in question.
>
> (2) Any such application shall be in Form 19D, duly attested in accordance with the provisions of section 211, and shall be accompanied by the prescribed fee, and the issue document of title ... .
>
> (3) The Registrar shall note on any such application the time at which it was received (being, in case of any application sent by post, the time at which it was withdrawn from its cover in the Registry or, as the case may be, Land Office) and, unless he is prohibited from doing so by any Registrar's caveat, private caveat, trust caveat or prohibitory order, shall as soon as may be thereafter —
>
> (a) enter the caveat applied for on the register document of title to the land in respect of which, ... , it is to have effect; and
>
> (b) serve a notification in Form 19A on the proprietor of that land ... .

In her Form 19D application, the second respondent had declared that the issue documents of title of the lands had been deposited with her as security for a debt due to her, this being the RM100,000 loan that she had advanced to the executors, the then registered proprietors of the lands.

However, the right to have the lien-holder's caveat registered is, inter alia, subject to the second respondent complying with the procedure as provided for under s 281 of the NLC and that the first respondent is not prohibited by the appellant's caveat from effecting the registration of such a caveat. See sub-ss (1) and (3) of s 330.

Section 281 in so far as is relevant makes the following provisions:

> 281 (1) Any proprietor ... may deposit with any other person or body, as security for a loan, his issue document of title ... and that person or body —
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat;
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land ... .
>
> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land ... .
>
> (3) Any such application shall be made in accordance with any law for the time being in force relating to civil procedure; and the provisions of sections 257 to 259 and sections 266 to 269 shall apply, mutatis mutandis, where any such application has been made as they apply where a chargee applies for an order under section 256.

A It is clear that the provisions of s 281 treat a line-holder's caveat in the same manner as the law treats a charge. Expressed in another way, a caveatee with a lien-holder's caveat has rights and obligations akin to a chargee.

In these proceedings, there is no evidence to show that there is any B prohibition in the appellant's private caveat to prevent the first respondent registering the second respondent lien-holder's caveat. The very fact that he did, suggests that there is no such prohibition and in any event no objection had been taken by the appellant to such a registration.

With such a lien over the lands, can the second respondent apply to C have the lands registered into her name? This must depend on the manner in which she had acquired her proprietary interest over the lands as opposed to a mere registrable interest. Evidence of this may be apparent on her Form 14A application as her acquisition would have to be expressed by the consideration she had given. However, since her Form 14A application has never been tendered nor its contents disclosed, there is no D knowing what was considered by the first respondent to prompt him to effect the transfer.

However, considering the short span of three days between the registration of the line-holder's caveat and the transfer, the first respondent must have been influenced by the presence of the lien-holder's caveat to E have effected the transfer. If that be the case, the second respondent can only acquire proprietary rights over the lands under s 281(2) of the NLC and only in the following manner:

(1) The second respondent must have obtained a judgment for the debt due to her. This involves her suing and obtaining judgment against F the executors for the RM100,000 loan made by her to them.

(2) In the execution of such a judgment, she would have to obtain an order of court to sell the lands either by way of private treaty or by an auction.

(3) She would have to purchase the lands either by way of private treaty G or bid at the auction.

Fulfilment of all the above would entitle the second respondent to her proprietary rights over the lands and to have the lands registered in her name but in this case there is no evidence that any of the above events had taken place. For this very reason, I cannot see how the first respondent H could have effected the transfer in favour of the second respondent.

In fairness to the first respondent, I need to stress that he was not a party to the Supreme Court proceedings and that he was in receipt of the Supreme Court order only on 18 July 1972, well after he had registered the lien-holder's caveat and effected the transfer. Here I am reminded of his I functions as outlined by Lord Diplock in the Privy Council case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 to be as follows (at p 214):

> ... By s 324, the registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form, he must enter

the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.

Under the circumstances, can the appellant now apply under s 417(1) of the NLC to set aside the transfer? As I have pointed out, the extent of the application of s 417(1) is limited to require the first respondent to take appropriate steps to comply with the Supreme Court order. That order in no uncertain terms directs the first respondent to remove the private caveat bearing Presentation No 258/87, Jilid No 8, Folio No 72, lodged by the second respondent.

The first respondent has since removed the second respondent's private caveat when a copy of the Supreme Court order was served on him on 18 July 1992. As the order contains no other directive, the first respondent has done all that he had been ordered to do by the Supreme Court. To expect him to delete the transfer as well would be reading into the Supreme Court order a directive that is not there.

For the same reason, the second respondent cannot be held to be in contempt of the Supreme Court order for apart from the specific directive addressed to the first respondent, she was, unlike the first respondent, never directed to do anything. Proceedings for leave to have her committed for contempt for disobeying the Supreme Court order have since been dismissed by the Supreme Court on 1 March 1994 in Supreme Court Civil Appeal No 02–254–91.

Consequent upon the above findings, I consider that on the facts of this case, the only way the transfer can be cancelled is for the appellant to proceed under s 418 of the NLC which contains the following provisions:

> 418 (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.
>
> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just.
>
> (3) In this section 'decision' includes any act, omission, refusal, direction or order.

There is no denying the fact that the appellant had been aggrieved by the first respondent's action in effecting a transfer of the lands to the second respondent. Subsection (1) of s 418 allows the appellant to appeal to the High Court against such an action but their right to do so is limited to the three-month period of the transfer being communicated to them. On the appellant's own admission, such a decision was communicated to them on 18 July 1992, the very day they served the Supreme Court order on the first respondent, and time starts to run from that date. Since no appeal has been filed by the appellant, the matter has become statute-barred.

A Finally, I come to the appellant's submission that the indefeasibility of title and interest under s 340(1) of the NLC cannot be relied upon by the second respondent as she had acquired her title by means of an insufficient or void instrument under s 340(2)(b) of the NLC and to that end her title is defeasible. The only flaw to his contention is that the instrument upon which the transfer was effected, the Form 14A application, has never been tendered in evidence and as such this court does not know what consideration was given by the second respondent to enable her to acquire title. In the absence of such evidence, I have only her lien-holder's caveat upon which the first respondent had acted to effect the transfer but as I have indicated earlier on in this judgment, registration of the lien-holder's caveat per se does not entitle the second respondent to the proprietary rights over the lands unless and until she had complied with the provisions of s 281(2) of the NLC. In any event, I consider that it is highly improper to question the second respondent's proprietary rights in proceedings under s 417(1) based on affidavit evidence alone.

As the only issue raised is whether, on the facts of this case, s 417(1) of the NLC has been correctly applied for by the appellant and I say it has not, I am compelled to dismiss this appeal and in this respect confirm the decisions of the High Court. As for the costs of the proceedings, both before this court and in the court below, I am mindful of the fact that it was the second respondent who initiated the transfer unilaterally by stealing a march on the appellant and the first respondent. For this questionable and inequitable conduct on her part, I consider that she must bear the costs of all proceedings and I accordingly order that all costs incurred by the appellant and the first respondent both here and in the court below, be borne by the second respondent and be taxed and paid by her to the appellant and the first respondent forthwith. As for the deposit, this will be refunded to the appellant.

Appeal dismissed.

Abdul Malek Ahmad JCA: The factual framework of this appeal has been well laid out by my learned sister Siti Norma Yaakob JCA in her judgment. In consequence, I am so perturbed by the sequence in the series of suits filed over the same subject matter for the last 31 years or so that I find it quite necessary to deal with the decisions made in each. While doing so, and in coming to a different conclusion, I need to restate part of the facts stated in her judgment as a matter of continuity.

Starting as long ago as 20 December 1966, the first advance of RM29,500 had been made by JN Patel ('Patel') as Managing Director of the appellant to Mahalingam Ratnavale ('Ratnavale'). The second advance was on 21 March 1967 amounting to RM250,000. This was to enable Ratnavale to purchase Meera Estate which included the two subject lands, namely Lot No 290 under Surat Putus Kecil 1171 and Lot No 461 under Surat Putus 715 both in Mukim Kulim, Kedah ('the lands').

Fifty thousand dollars was paid on 20 June 1968 and for the balance of RM229,500, Ratnavale promised to transfer the lands to the

appellant. Accordingly, Patel entered a private caveat bearing Presentation No 130/72 Folio No 1/21 ('the first caveat') on 6 November 1972 on his own behalf and on behalf of the appellant. A

Now, if the promised transfer had indeed taken place, that would have made the present proceedings quite unnecessary. Since it did not, and since Ratnavale passed away on 9 April 1973 without paying the amount outstanding, Patel had on 30 July 1974 filed recovery proceedings against Ratnavale's two brothers as the executors and trustees of Ratnavale's estate ('the executors') in Ipoh High Court Civil Suit No 235 of 1974 ('the first action'). The lands were registered in the names of the executors as legal representatives of Ratnavale's estate on 15 September 1974 after the filing of the first action. The appellant was also substituted in place of Patel in the recovery proceedings. B C

The executors filed Originating Motion No 18 of 1974 ('the second action') in the Alor Setar High Court to remove the first caveat lodged in the names of Patel and the appellant. This was dismissed on 7 December 1974. The executors' appeal to the Federal Court vide Civil Appeal No 6 of 1975 ('the first appeal') was dismissed on 6 June 1975 wherein the Federal Court (Suffian LP, Lee Hun Hoe CJ (Borneo) and Wan Suleiman FJ) held that both Patel and the appellant had a caveatable interest over the lands. D

Suffian LP in *Mahadevan & Anor v Patel* [1975] 2 MLJ 207 had said at p 208: E

> With respect, I do not think there is any merit in this appeal. The whole system of caveats is founded on the principle that they exist for the protection of *alleged* as well as proved interests. It is not for us at this stage to say whether or not the respondent or whether or not the company has a good claim at law against the appellants, but it seems clear that there is evidence which if believed at the trial of the substantive issue would establish that the respondent, who was managing director of the company, was acting throughout on behalf of the company in regard to the money paid to Ratnavale, and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person *claiming* title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat, in my judgment, it was proper for the respondent to enter the caveat, and right for the learned judge to refuse to remove it, so that it may remain on the register until the disposal of the suit pending between the company and the appellants. F G
>
> The receipt, if believed, will show that the money lent to Ratnavale was lent by the company and that it was the intention of the parties at the time that the loan should be secured by a charge over the lands concerned. To the argument that in that case the company alone has a caveatable interest, I agree with the argument on behalf of the respondent that, as the respondent was acting in his capacity as managing director of the company, both the respondent and the company have a caveatable interest in the lands. H I

I need to mention here that the effect of the decision in the first appeal was that both the appellant and Patel had a caveatable interest in the lands pending the decision in the first action.

A On 30 May 1975, before the decision of the first appeal, the second respondent had registered a private caveat ('the second caveat') on the basis of an agreement with the executors to charge the lands as security for a RM100,000 loan given by her to the executors. It is pertinent for me to point out at this juncture that no other details of the agreement had been B furnished by the second respondent.

At this point in time, therefore, the first caveat and the second caveat were still on the lands, the former by the appellant, and confirmed by the Federal Court in the first appeal to be properly lodged, and the latter by the second respondent. It is also interesting to note that the second respondent had registered the second caveat only six days before the C decision in the first appeal in favour of the appellant.

Then, on 28 May 1981, the second respondent had entered a second caveat ('the third caveat') over the lands claiming that Ratnavale had incurred a debt of RM17,179.92 in his lifetime. I pause here to emphasize the fact that Ratnavale had passed away on 9 April 1973 which was some D eight years earlier but the second respondent had seen it fit not to file a caveat earlier especially when she had, about six years before the third caveat, filed her earlier caveat, namely the second caveat, on 30 May 1975.

The first action was decided, after a lapse of nine years, on 22 March 1983 where EE Sim JC held that it was not barred by limitation and, in E deciding for the appellant, ordered that the executors repay the appellant the balance of RM229,500 advanced by the appellant to Ratnavale and that the executors be restrained from transferring, charging, or in any way dealing with, the lands charged.

I pause here to point out that the words 'prohibitory order' appear three times on the titles in relation to the first action but at the subsequent F hearing to clarify the matter, it has been brought to our attention by learned counsel for the appellant and for the second respondent that it had no connection at all with the restraining order given in the first action and in any case, the appellant did not proceed with the execution. The endorsements, therefore, should not have been there in the first place. As G for the restraining order or the injunction granted in the first action, it is of course not registrable or indorsable on the titles following *Heng Bak Teong & Anor v Ng Ah Seng* [1988] 1 MLJ 406. The appeal against the High Court decision was not proceeded with and was dismissed by the Supreme Court on 7 August 1989.

H The executors duly appealed against the decision vide Federal Court Civil Appeal No 119–1983 ('the second appeal'). On 20 January 1984, the Federal Court (Salleh Abas CJ (Malaya), Abdul Hamid and Syed Agil Barakbah FJJ) in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 held that the second advance of RM250,000 was a personal loan from Ratnavale and was barred by limitation. It therefore I allowed the appeal in part. As for the first advance of RM29,500, the appeal was dismissed.

The appellant appealed ('the third appeal') to the Privy Council. Pending that decision, they had filed another private caveat Presentation

No 471/84 ('the fourth caveat') on 18 October 1984 based on Ratnavale's agreement to charge the lands for the second advance which the Federal Court in the second appeal had held was statute barred. A

The Privy Council (Lord Bridge of Harwich, Lord Templeman, Lord Mackay of Clashfern and Sir Denys Buckley) allowed the appeal on 10 February 1986 and set aside the order of the Federal Court in the second appeal. It accordingly restored the decision of the judicial commissioner in the first action. It further held in *Manilal & Sons (M) Sdn Bhd v Mahadevan & Anor* [1986] 1 MLJ 357 that neither the reasons expressed in the judgment of the Federal Court in the second appeal nor the additional matters raised in argument by the learned counsel for the respondents at the hearing of the third appeal were sufficient to displace the findings of fact on this matter by the learned judicial commissioner in the first action. They were also of the view that the plea of limitation failed since the action was raised within six years from the date on which the cause of action in respect of the balance of RM229,500 arose. They also deleted from the judicial commissioner's order the words 'on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah' ('the first deletion') and the words 'compound interest with yearly rests'. B C D

The first deletion had been highlighted, quite repeatedly by learned counsel for the second respondent in his submissions, and also by the trial judges hearing the subsequent suits at first instance, to show that the Privy Council was of the view that the claim by the appellant in the first action were purely monetary in nature and had no connection with the lands at all. E

In commenting on learned counsel for the appellant's submissions on this point when attempting to explain the effect of the first deletion by the Privy Council in the third appeal, Peh Swee Chin J (as he then was) in Originating Summons No 31–1840–86 ('the third action') had said: F

> The contentions of the applicant can be summarized as follows. Pursuant to order or judgment of the Privy Council restoring and altering in part the High Court order as described above, the plaintiff no longer had interest in the said lots capable of sustaining its caveat; ie Caveat No 471/84. It was argued also that the injunction was consequent to the equitable charge and lien in the High Court order and since the lien and equitable charge were removed by the Privy Council, all that was left was a judgment for money lent and the injunction (that was not deleted) did not make sense. G

On the same note, KC Vohrah J in Originating Motion No 25–29–1989 ('the fourth action') (see *Manilal & Sons (M) Sdn Bhd v M Majumder* [1991] 3 CLJ 2172 at p 2175) had stated: H

> Counsel for the applicant company at the hearing argued that its claim to the said two lots arose on 21 March 1967, the date on which the receipt for RM250,000 was given by the common solicitors of the company and Ratnavale for the purchase of the two lots of land as a joint investment of the company and Ratnavale. I can find nothing in the decision of the Privy Council to indicate that the assertion is correct. As I understand the judgment of the Privy Council, the claim on the company was purely a monetary claim and the judgment of the Privy Council proceeded on that basis. I

To clear any lingering doubts on this issue by any party, I therefore, find it most pertinent to reproduce the letter from the Privy Council Office dated 31 March 1987 ('the Privy Council letter') which appears at p 120 of the appeal record as regards the first deletion in the third appeal:

PRIVY COUNCIL OFFICE
Downing Street London SW1A 2AJ

Telephone Direct Line 01-270 0487
Switchboard xxxxxx

Please address any reply to The Registrar

The Senior Assistant Registrar
The Supreme Court of Malaysia
KUALA LUMPUR
Malaysia

Your reference
(92) in FCCA 119/83
Our Reference

Date
31 March 1987

Dear Sirs,

Privy Council Appeal No 10 of 1985
Manilal & Sons (M) Sdn Bhd v Mahadevan s/o Mahalingam & Anor

At the request of Mr Anthony Diamond QC, counsel for the appellants, I have sought their Lordships' advice regarding the last paragraph of their judgment in which the Board advised that the judgment of the judicial commissioner should be restored with the deletion therefrom of the words 'on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah'.

The deletion is explained in the penultimate paragraph of their Lordships' judgment where they point to the consideration given by the courts below to the question whether an equitable charge is recognized by the law of Malaysia. In their case on the appeal, the respondents had submitted that such a charge was not recognized by the law of Malaysia. Their Lordships heard no argument on this aspect of the appeal, having decided that it might be disposed of in accordance with the submissions of the parties by reference to when the cause of action arose. The only question argued before and decided by their Lordships was whether the claim was statute barred and it was in this connection only that the question of whether there was a valid charge securing the debt was relevant.

Their Lordships accordingly concluded that, in view of the dispute upon whether an equitable charge is recognized in Malaysia, it would be inappropriate to affirm the judicial commissioner's order in this respect. The reference to the equitable charge was therefore deleted.

In the circumstances, it will be clear that their Lordships' decision was not an authoritative decision either way on whether or not such a charge as was alleged is recognized by the law of Malaysia.

I am sending copies of this letter to Messrs Waterhouse & Co and Messrs Philip Conway Thomas & Co, the parties' Privy Council Agents in London.

Yours faithfully, A

Sgd
DHO Owen
Registrar

It is, therefore, quite clear, in my view, that the first deletion by the Privy Council in the third appeal did not in any way indicate that it was purely a monetary claim. B

On 22 November 1986, the second respondent filed the third action in the Ipoh High Court asking to remove the appellant's Private Caveat No 471/84 which was the fourth caveat. In effect, the fourth caveat was necessary and cannot be said to be redundant in view of the Federal Court's decision in the second appeal, which held the claim in the first action involving the first caveat to be statute barred, and although the Privy Council decision in the third appeal was in favour of the appellant when it declared the first caveat quite in order, the first caveat would have automatically lapsed after six years in view of s 328 of the National Land Code 1965 ('the NLC') although from the entries on the titles, I do not see any cancellation having been made. Two days later, Peh Swee Chin J (as he then was) granted her application ex parte and the appellant, upon knowing of the order, had applied to set it aside. This was dismissed on 26 January 1987. The learned trial judge confirmed his earlier order and even deleted that part of the Privy Council's order restoring the judicial commissioner's order imposing an injunction to restrain all dealings on the lands. C D E

On appeal by the appellant in Supreme Court Civil Appeal No 52 of 1987 ('the fourth appeal'), the Supreme Court (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) in *Manilal & Sons & (M) Sdn Bhd v M Majumder* [1988] 2 MLJ 305 restored the Private Caveat No 471/84 (the fourth caveat) of the appellant and the injunction on the ground that the learned judge had no jurisdiction to alter the Privy Council's decision. F

Lee Hun Hoe CJ (Borneo) had said at p 307: G

In dealing with the order of injunction which was left intact by the Privy Council, the learned judge stated at p 13 of the appeal record:

> '... The survival of this paragraph became the bone of contention in this originating summons in relation to the said lots, viz Lot 290 and Lot 461, Mukim of Kulim, Kedah ('the lots'). H

At p 21 he said:

> '...The injunction was to all intents and purposes, in my view, to enable an equitable charge to be executed and such equitable charge was found by the learned judicial commissioner to be a temporary security for the payment to the deceased of those two sums, pending the sale of Meera Estate ... .' I

He went on to say at p 24:

> '... From the facts or circumstances, the only rationale for making the order for the injunction was to shore up the said equitable charge and to enable it to be executed.'

What he had so far stated was right. This was conceded by the appellant. But he went wrong, when he considered that the deletion of one part must also meant the deletion of another part. For he stated at p 24:

> 'In my judgment, the necessity for the injunction (with the removal of that part of the order for the payment of the judgment sum to be secured by the lien and equitable charge) had ceased to exist.'

With great respect, it is not for him to speculate as to the effect of the order of the Privy Council and to alter it. His only duty is to execute the order of the Privy Council. The Law Lords thought fit in the circumstances to delete that part of the order in respect of a lien and equitable charge.

Their Lordships also discussed the point as to whether an injunction can be given in the case of a caveat. At p 308, the judgment states:

> It is not uncommon for caveat and injunction to exist side by side. Together, they give a complete safeguard. In *Walsh v Alexander* (1913) 16 CLR 293 where the defendant agreed to sell the plaintiff a certain homestead selection but subsequently repudiated the agreement, an order for specific performance was made and an injunction in terms was also granted. On appeal, Barton ACJ said at p 303:
>
> > 'It is urged that the respondent's caveat sufficiently protects him, and therefore he cannot have an injunction. I do not agree. The caveat does not give the purchaser relief as comprehensive or as direct as he gains by the jurisdiction in personam, and therefore it cannot be held to be the exclusive remedy ... .
>
> Isaacs J put it in another way at p 305:
>
> > '... Mr Loxton argued that as the legislature has provided for a caveat which effectual prevents a "dealing" being registered contrary to the agreement, that ousts the ordinary jurisdiction of the court to grant an injunction. There are two answers to that. The narrow one is that a dealing by way of transfer or lease or mortgage is not the only method of transgressing the contract. Retention and user and alteration of the property by the defendant himself could not be prevented by a caveat, and these are equally within the dominion claimed by him. But the broader ground is this: that where rights and liabilities are not created by a statute, but arise by common law, then, even though they are affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, unless the statute expressly or by necessary implication excludes the common law remedy, the latter still remains.'

To my mind, the Supreme Court decision in the fourth appeal meant that the fourth caveat lodged by the appellant was proper and that the executors would continue to be restrained from dealing with the lands in any way.

While that appeal was pending, the second respondent had lodged her third caveat bearing Presentation No 258/87, Jilid 8, Folio 72 ('the fifth caveat') on 13 September 1987 based on the promise contained in a letter from Ratnavale's attorney dated 27 February 1973 to transfer the lands to her. Again, it is of particular interest to observe that the fourth appeal had commenced hearing on 7 September 1987 and this lodgment was six days after that, although the promise was for a letter purportedly written 14 years before that for which the second respondent had not deemed it fit to file the fifth caveat earlier.

Subsequent to this lodgment, the appellant filed the fourth action in the Alor Setar High Court and pending the hearing, they had filed another private caveat Presentation No 499/90, Jilid 14, Folio 86 ('the sixth caveat') on the lands.

The fourth action was dismissed on 11 June 1991. KC Vohrah J in *Manilal & Sons (M) Sdn Bhd v M Majumder* [1991] 3 CLJ 2172 was of the view that there were controversial issues of fact raised which cannot be determined on affidavit evidence and there were also issues of law not fully canvassed, the resultant effect of which the application could not succeed. He had accordingly dismissed it with costs.

Subsequent to the filing of the fourth action but prior to it being heard, the second respondent had commenced proceedings against Annalakshmi Ratnavale nee Vettivelu Annalakshmi ('Annalakshmi') in Originating Summons No 24–292–1990 ('the fifth action') for declarations that the power of attorney dated 25 April 1972 granted by Ratnavale to Annalakshmi was void ab initio and that all dealings entered into by her, her servants, agents, nominees or otherwise are of no effect in law or otherwise. I do not have the benefit of the records in that case but it is my view that filing a declaration 18 years after the event, quite apart from being out of time, certainly tells something of the character of the applicant, namely the second respondent, who had all along over the years been filing caveats and proceedings one after another as regards the lands all at a very late stage and either, in the case of a caveat, while an action or appeal was pending or soon before or soon after it had been decided. It is also not clear whether this particular application was inter partes. It is necessary to state that Ratnavale had earlier on 22 March 1971 granted a power of attorney to his two brothers M Mahadevan and M Sandrasegara, who later became the executors and trustees of his estate. As regards the fifth action, Peh Swee Chin, J (as he then was) granted the declarations asked for on 9 March 1990 ('the High Court order').

Reverting to the decision in the fourth action, the appellant appealed vide Supreme Court Civil Appeal No 02–254–1991 ('the fifth appeal') and the Supreme Court (Jemuri Serjan CJ (Borneo), Mohd Azmi and Gunn Chit Tuan SCJJ) allowed the appeal on 14 April 1992 and ordered ('the Supreme Court order') the first respondent to remove the second respondent's caveat (the fifth caveat) forthwith. That would leave the injunction granted in the first action, confirmed by the Privy Council in the third appeal and maintained by the Federal Court in the fourth appeal, in favour of the appellant still remaining on the lands and the sixth caveat, lodged by the appellant on 16 October 1990 still on the register as the appellant's caveat lodged on 18 October 1984 (the fourth caveat) would have lapsed by then.

About a month later, on 13 May 1992, the second respondent managed to get the first respondent to transfer the lands into her name. The first respondent, of course, was quite unaware of the Supreme Court order but the second respondent surely was. Why then, did she ask the first respondent to do what he did especially when there was the appellant's

caveat (the sixth caveat) still endorsed on the titles and the injunction restraining the executors from any dealings on the lands still standing on the lands?

That was when the appellant filed the proceedings leading to this appeal vide Originating Motion No 25–26–1993 ('the sixth action') in the Alor Setar High Court for an order under s 417 of the NLC directing the first respondent to expunge the registration of the transfer of the lands to the second respondent so as to give effect to the Supreme Court order.

What is the effect of the Supreme Court order? It simply means the second respondent has no caveatable interest over the lands as from that date. It follows from this that if she has no caveatable interest, how could she enter a lien-holder's caveat and subsequently obtain a transfer of the lands into her name? Being conscious of this, the second respondent had filed a Form 19D application on 3 May 1992 for the entry of a lien-holder's caveat under s 330 of the NLC. However, this application was rejected by the first respondent for reasons not known. The second respondent applied again one week later on 10 May 1992 and was successful the second time around. It is, however, the transfer by the first respondent on 13 May 1992 that is being challenged by the appellant. It must be emphasized here that the second respondent made this application to the first respondent without the knowledge of the appellant and within less than a month of the Supreme Court order. Needless to say, the first respondent was totally unaware of the Supreme Court order at the relevant time.

The appellant's solicitors had immediately written to the first respondent asking for an explanation how this could take place when the appellant's private caveat Presentation No 499/90, Jilid 14, Folio 86 (the sixth caveat) was endorsed on the titles. Getting no response from the first respondent, the appellant had filed the sixth action.

The learned trial judge (Mohd Ariff Othman J) in the sixth action held that the appellant's application under s 417 of the NLC sought to determine the interest and title of the disputing parties to the lands was based on affidavit evidence and in effect was asking the court to go behind the Supreme Court order. He was of the view that the appellant should have instead taken action under s 418 of the NLC, which was now barred by the limitation period of three months provided therein since the appellant did not proceed within that period from 18 July 1992 on being informed by the first respondent.

Subsection (1) of s 417 of the NLC states:

> (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.

Section 418 of the NLC provides:

(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.

(2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just.

(3) In this section 'decision' includes any act, omission, refusal, direction or order.

According to the first respondent in his affidavit in reply dated 30 October 1993, he had received the second respondent's second application on 10 May 1992 in the form of a Form 19D application to enter a lien-holder's caveat on the lands to protect her interest as the titles of the lands had been deposited with her by the executors as security for the RM100,000 loan she had given. When the depositing had taken place is not clear but the injunction had the effect of restraining the executors from dealing with the lands in any manner. In her application to the first respondent, the second respondent had attached her statutory declaration affirmed on 9 May 1992 and the High Court order dated 9 March 1990, the effect of which was to declare that the power of attorney by Ratnavale to Annalakshmi was void ab initio and consequently all dealings entered into by Annalakshmi, her servants, agents, nominees or otherwise under the power of attorney dated 25 April 1972 were void ab initio and of no effect at law or otherwise.

Now, we have to pause and question the second respondent's motive in only attaching the High Court order of 9 March 1990 in her application on 10 May 1992 but not the more recent Supreme Court order dated 14 April 1992.

Following that, the first respondent had on 10 May 1992 endorsed the register documents of title of the lands by entering the High Court order of 9 March 1990 and the second respondent's lien-holder's caveat bearing Presentation No 180/92, Jilid 10, Folio 88 ('the seventh caveat').

On 13 May 1992, which was only three days later, the first respondent registered a transfer of the lands (Transfer No PTD 816/92, Jilid 208, Folio 30) in the name of the second respondent. How could he have done so if the sixth caveat filed by the appellant was still on the titles? There is no evidence tendered of when the second respondent had lodged her Form 14A application. With the documents submitted, the first respondent was of the view that dealings on the lands, including the caveats lodged, after 25 April 1972, which was the date of the power of attorney complained against, were void. But what about the injunction?

The first respondent was never told of the Supreme Court order which threw a different light on the matter as the effect of that was that the second respondent's caveat (the fifth caveat) was cancelled as of 14 April 1992. As of that date, only the appellant's caveat remained (the sixth caveat) and if the first respondent had been told of the Supreme Court order, to my mind, he certainly would not have endorsed the titles with the

lien-holder's caveat and the subsequent transfer the way he did. How the lands were transferred into the second respondent's name only three days after that remains a mystery considering the lack of evidence in this respect.

It must be stressed here that the High Court order of 9 March 1990 only declared void all dealings by Annalakshmi, her servants, agents, nominees or otherwise. It does not declare void caveats entered into by the appellant. The sixth caveat by the appellant on 16 October 1990 is still on the register. As such, the first respondent is prevented from entering the lien-holder's caveat and registering the transfer the way he did on 13 May 1992 in view of sub-s (2) of s 322, in particular para (c), of the NLC which reads:

> 322(2) The effect of any private caveat expressed to bind the land itself shall, subject to subsections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of —
>
> (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;
>
> (b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and
>
> (c) any lien-holder's caveat in respect thereof.

Subsection (6) of s 322 of the NLC provides that where the registration of any instrument, or the endorsement or entry of any claim or lien-holder's caveat is prohibited by any private caveat, the registrar shall reject the instrument or, as the case may be, application for endorsement or entry.

Subsection (5) of s 322 of the NLC states:

> A private caveat shall not prohibit the registration or endorsement of any instrument or claim where —
>
> (a) the instrument was presented or the application for endorsement made by the person or body at whose instance the caveat was entered; or
>
> (b) the said instrument or application was accompanied by the consent in writing of that person or body to its registration or, as the case may be, to the making of the endorsement.

In the particular instance, there is no consent from the appellant who is the holder of the sixth caveat.

It is also my view that the second respondent cannot acquire any proprietary rights over the lands until she has obtained a judgment for the RM100,000 debt due to her from the executors. And, to execute that judgment, she would have to get an order for sale of the lands pursuant to sub-ss (2) and (3) of s 281 of the NLC. With the evidence at hand, I fail to see how the first respondent could have transferred the lands to the second respondent irrespective of whether or not he had been aware of the Supreme Court order.

My learned sister Siti Norma Yaakob JCA has stated in her judgment that the appellant cannot ask the first respondent to now delete the

transfer as this would not be appropriate as that was not what the Supreme Court order had directed. Of course, that is true since the transfer was made only after the Supreme Court order. But if the first respondent had been aware of the Supreme Court order on 10 May 1992, he surely would not have entered the lien-holder's caveat and the transfer as he had no power to do so under the NLC. In fact, even without the Supreme Court order, he cannot even enter the lien-holder's caveat in view of para (c) of sub-s (2) of s 322 of the NLC. Things must be put back into place according to sequence. On 10 May 1992, even the second respondent's caveat ordered to be removed by the Supreme Court order had yet to be removed.

The second respondent cannot be said to be guilty of contempt as the Supreme Court order is not directed at her and correctly, proceedings for leave to have her committed for contempt for not obeying the Supreme Court order had been dismissed on 1 March 1994 in Supreme Court Civil Appeal No 02–254–1991 ('the fifth appeal'). But she had stolen a march on the appellant by applying the way she did on 3 May, 10 May and 13 May 1992. Even learned counsel for the second respondent had conceded in his submissions that the action of the second respondent on these dates cannot be said to be above board.

At the end of it all, what is the effect of the Supreme Court order? Simply put, it means, with that order, the documents of title should only have the appellant's caveat (the sixth caveat) and nothing else. This is because the second respondent had lost her caveatable interest. Any transfer would be contrary to the Supreme Court order as the basis for it, namely the fifth caveat, had been removed. Any lien-holder's caveat would be against the NLC. The injunction against any dealings does not cover caveats but irrespective of whether the first respondent had been made aware of the Supreme Court order, he certainly could not even enter the second respondent's lien-holder's caveat in view of para (c) of sub-s (2) of s 322 of the NLC and especially so when he had rejected it for some other reason one week earlier. To do all such things as may be necessary to give effect to the Supreme Court order means only the sixth caveat and the injunction should remain. In that event, the first respondent would have to cancel the fifth caveat and he would also have to cancel the errors he made on 10 and 13 May 1992 when he respectively entered the lien-holder's caveat and registered the transfer.

I also hold that the first respondent should have been more cautious in his dealings in view of the repeated lodgment of caveats by the parties over the years and because the basis for the second respondent's applications on 3, 10 and 13 May 1992 was after a delay quite inordinate in the circumstances as she could have promptly done so after the promise by the executors 18 years earlier or after the High Court order on 9 March 1990 itself.

A careful scrutiny of all the final decisions in the actions and appeals filed indicate that the appellant's caveat is always to remain and the second respondent's caveat is always to be removed. How, then, can the lands be transferred to her?

Paragraph (c) of s 301 of the NLC provides:

> 301 When an instrument is fit for registration
>
> An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied —
>
> (a) ...;
>
> (b) ...;
>
> (c) that the dealing which it effects is not contrary to any prohibition or limitation imposed by this Act or any other written law for the time being in force, or to any restriction in interest to which the land in question is for the time being subject;

Subsection (2) of s 340 at para (c) of the NLC states:

> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) ...;
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

On the facts of this case, there appears to be a case of misrepresentation here when the second respondent failed to furnish a copy of the Supreme Court order when making the application for the transfer.

In *Woon Kim Poh v Sa'amah bte Hj Kasim* [1987] 1 MLJ 400, the Supreme Court (Wan Suleiman, Hashim Yeop A Sani and Wan Hamzah SCJJ) held, among other things, that in the Torrens system where registration is the very basis of the system, the prohibition in sub-s (2) of s 322 of the NLC, which prohibits registration, endorsement or entry on the register document of title of any instrument of dealing so long as a caveat is in force, must be strictly complied with and the registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the NLC.

In effect, the orders of the first respondent on 10 May 1992 as regards the entry of the lien-holder's caveat and 13 May 1992 as regards the transfer of the lands cannot be said to be valid. As such, an appeal under s 418 of the NLC is out of the question.

In *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, the Federal Court said at p 39:

> The respondent however argues that the second order in any event stands until and unless it has been set aside, and that the appellant's failure to appeal under s 418 to have it set aside is fatal and it is therefore not now open to the appellant to question its validity in these proceedings. The learned judge accepted this contention and in effect based his decision on this premise.
>
> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever

it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1976] 2 QB 729 at p 736, Lord Diplock LJ (now a Law Lord) said that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.'

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to [do so], because he is at liberty to treat the act as void' (*Birmingham (Churchwardens and Overseers) v Shaw* (1849) 10 QB 868 at p 880 at p 880, per Denman CJ; 116 ER 329). In *Barnard v National Dock Labour Board* [1953] 2 QB 18 at p 34, it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (per Singleton LJ). *Ridge v Baldwin* [1964] AC 40 is to the same effect.

For the record, the second respondent had applied vide Originating Summons No 24–49–94 ('the seventh action') for a declaration that on a proper interpretation of the Privy Council order in the third appeal, the appellant had only obtained a purely monetary judgment against the executors. This decision is still pending appeal but it is cited here to show that it also coincides with the letter from the Privy Council Office and the decision of the Federal Court in the fourth appeal.

The High Court (Mohd Hishamuddin J) held that the plaintiff there, who is the second respondent here, was never a party to the Privy Council order in the third appeal and clearly had no locus standi in that case. He also held that in view of the fact that the injunction granted by the High Court order was restored by the Privy Council order, the Privy Council order could not be said to be a purely monetary judgment.

In these circumstances and on these considerations, it is my finding that the application has been correctly made under s 417 of the NLC. There is no necessity to resort to s 418 of the NLC as the transfer is a nullity. I would allow the appeal with costs against both respondents here and below, set aside the orders of the learned trial judge and order the first respondent to delete all entries made after 14 April 1992, except for the removal of the fifth caveat which is what the Supreme Court order directed.

Appeal allowed.

Mohd Noor Ahmad J: I have had the benefit of reading the judgments of my learned sister Siti Norma Yaakob JCA and of my learned brother Abdul Malek Ahmad JCA. As the facts had been succintly put in the judgments, I need not repeat them here.

The facts definitely demonstrate a questionable conduct on the part of the second respondent throughout the episode and the impropriety in the exercise of powers by the first respondent in the face of the injunction granted by EE Sim JC on 22 March 1983 restraining the executors from

transferring, charging or in any way dealing with the lands charged and the sixth caveat as cited in the judgment of Abdul Malek Ahmad JCA. No doubt that by reason of the provisions of s 54(d) of the Specific Relief Act 1950, the injunction does not bind the first respondent. However, this does not mean that on the exercise of his statutory powers under the National Land Code 1965 ('the NLC'), he can do acts inconsistent with the provisions of the NLC. Indeed, the entry of the lien-holder's caveat and the subsequent registration of the transfer of the lands in favour of the second respondent were done contrary to the provisions of the NLC, in particular s 322(2)(a) and (c) and against logic which resulted in injustice to the appellant; and therefore it needs to be rectified.

What is in issue here is whether the rectification can be done through the machinery of sub-s (1) of s 417 of the NLC which the appellant had adopted.

The subsection reads:

> The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to *any judgment or order given or made in any proceedings* relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith. (Emphasis added.)

The subsection empowers the court or a judge to direct the Registrar to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land and it is incumbent upon him to comply with the order forthwith. From established authorities, as highlighted in the judgment of Siti Norma Yaakob JCA, the extent of the operation of the section is of limited application only. It does not empower the court to allow a defective or void private caveat to be amended by the caveator and it does not authorize the court to make an order or direction contrary to the NLC itself, that is to say, it does not authorize the court to direct the registrar to make an entry inconsistent with the scheme of the NLC. Although the subsection does not set out the terms on which a court action can be taken, it confirms the inherent or general jurisdiction of the court over the registrar or land administrator.

My view is that the expression 'any judgment or order given or made in any proceedings' appearing in the subsection is not confined only to a judgment or order given or made in the impugned proceeding but also includes any existing valid order of the court made in previous proceedings relating to the same lands. The subsection should be given a liberal interpretation so that the exercise of the inherent or general powers of the court over the registrar will be more meaningful in order to ensure that the registrar really complies with the provisions of the NLC. If, as has been held, the court is not authorized to make an order or direction contrary to the NLC, surely the registrar is also not authorized to act contrary to the provisions of the NLC. It must have been the intention of Parliament in enacting the subsection to empower the court through proceedings to strike down any act of the Registrar which is inconsistent with the provisions of the NLC. Therefore, such interpretation should be adopted to meet that intention. That being the case, to my mind, 'any order' referred to in the subsection should not be confined only to the Supreme Court order of

14 April 1992 but should also include the injunction order made by EE Sim JC, in the previous proceeding which is valid and still existing. And the only way to give effect to the latter order is for the court, under the subsection, to direct the registrar to cancel the entry of the lien-holder's caveat and the registration of the transfer. Certainly, such direction will not be contrary to the provisions of the NLC.

However, what has to be considered now is whether such direction can be given since the appellant's motion only relates to the Supreme Court order of 14 February 1992. To my mind, it can be given by virtue of the inherent powers of the court under O 32 r 4 of the Rules of the High Court 1980 which is preserved by O 4 of the Rules of the Court of Appeal 1994.

It is observed from the land titles that the injunction order had been registered as 'perintah larangan' on two occasions. To my mind, the Registrar was wrong in registering it as a prohibitory order because the injunction is not such an order as envisaged by s 334 of the NLC, which states:

> In this Chapter 'prohibitory order' means, where land or an interest in land held by a judgment-debtor is to be sold in execution proceedings, an order made pursuant to rules of court by a court of competent jurisdiction prohibiting the judgment-debtor from effecting any dealing therewith or from effecting such dealing therewith as may be specified in the order.

Furthermore, such endorsement was wrongly made because there is no provision in the NLC for an injunction order to be registered on the titles binding against all and sundry.

In the light of the above, I would allow the appeal with costs against the respondents here and below, set aside the orders of the learned trial judge and order the first respondent to delete all entries made after 14 April 1992, except for the entry relating to the removal of the fifth caveat as cited in the judgment of Abdul Malek Ahmad JCA made pursuant to the Supreme Court order.

Appeal allowed.

Reported by Jafisah Jaafar